SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 640

THE UNITED STATES OF AMERICA,
Appellant,

vs.

CAROLENE PRODUCTS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

GEORGE N. MURDOCK,
Counsel for Appellee.

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IN THE

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 3489

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CAROLENE PRODUCTS COMPANY, A CORPORATION,
Defendant.

OPPOSITION OF APPELLEE TO THE GRANTING OF APPEAL.

Comes now the CAROLENE PRODUCTS COMPANY, appellee herein, by its attorney, GEORGE N. MURDOCK, and files this its opposition to the granting of the appeal prayed for by appellant and for its reasons for such opposition states:

1. The Government seeks this appeal under the provisions of Title 18, Sec. 682 of the United States Code, which in part reads as follows:

> "Provided, that no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

The record shows that nearly two years prior to the return of the indictment in this case all questions involved herein had been decided in the decision of Judge FitzHenry,

which decision was adopted by the court as his reason for sustaining the demurrer herein, and which is sought to be reversed by this appeal. This former decision settled every point in issue here in favor of appellee. The decision was not appealed, and therefore became the law of the case, and made the question *res adjudicata.*

Gould v. *Evansville & C. R. R. Co.,* 91 U. S. 526, 532, 23 L. Ed. 416, 418, 419;

Alley v. *Nott,* 111 U. S. 472, 476, 28 L. Ed. 491, 492.

2. The sustaining of the demurrer to the first indictment became a final determination of the rights of the parties, and a bar to the indictment now before this court. (Id.)

Frank v. *Mangum,* 237 U. S. 309, 334, 59 L. Ed. 969, 983;

U. S. v. *Oppenheimer,* 242 U. S. 85, 87, 61 L. Ed. 161, 164.

3. The Government, not having been properly before the Court with the indictment in this case should not be allowed to appeal to the United States Supreme Court on a question and in a case which it was estopped from bringing.

Bissell v. *Spring Valley Township,* 124 U. S. 225, 31 L. Ed. 411.

4. This opposition to appeal involves the right of a citizen to rely upon a judgment in his favor and to be free from a further indictment for the same offense brought by the Government for the sole purpose of taking an appeal to the United States Supreme Court, every point involved in the second indictment having been ruled upon on a demurrer in the first case.

5. A demurrer is equally conclusive as a verdict would be and the facts then established can never be contested again between the same parties.

Gould v. *Evansville & C. R. R. Co.*, 91 U. S. 526;
Coffey v. *U. S.* 116 U. S. 436, 445, 29 L. Ed. 680;
Bissell v. *Spring Valley Township*, 124 U. S. 225, 31 L. Ed. 411;
Frank v. *Mangum*, 237 U. S. 309, 334, 59 L. Ed. 969, 983;
U. S. v. *Oppenheimer*, 242 U. S. 85, 87, 61 L. Ed. 161, 164.

WHEREFORE, appellee, having shown that the appellant was not properly before the court below, asserts that appellant could not be properly before the Supreme Court of the United States and hence the United States Supreme Court has no jurisdiction over such a matter, and therefore prays that the appeal be dismissed.

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